

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
AIR RESOURCES BOARD)	DECISION OF DISAPPROVAL
)	OF REGULATORY ACTION
)	
)	(Gov. Code, sec. 11349.3)
REGULATORY ACTION:)	
Title 13, California Code of)	
Regulations)	OAL File No. 08-0425-03S
)	
ADOPT SECTIONS 2265.1 AND 2265.5)	
AMEND SECTIONS 2260, 2261, 2262,)	
2262.3, 2262.4, 2262.5, 2262.9,)	
2263, 2263.7, 2264.2, 2265 (AND THE)	
INCORPORATED "CALIFORNIA PROCEDURES)	
FOR EVALUATING ALTERNATIVE SPECIFICA-)	
TIONS FOR PHASE 3 REFORMULATED GASO-)	
LINE USING THE CALIFORNIA PREDICTIVE)	
MODEL"), 2266, 2266.5, 2270, 2271, AND)	
2273)	
)	
)	
)	

SUMMARY OF REGULATORY ACTION

Health and Safety Code section 43013.1 requires that the Phase 3 California Reformulated Gasoline (CaRFG) regulations preserve emissions and air quality benefits of the Phase 2 CaRFG program. The use of ethanol in Phase 3 CaRFG increases evaporative emissions relative to Phase 2 CaRFG through permeation. The Air Resources Board proposed changes to title 13 of the California Code of Regulations to amend the CaRFG regulations and update the Predictive Model to mitigate the excess emissions associated with permeation from on-road motor vehicles.

DECISION

On June 9, 2008, the Office of Administrative Law disapproved the above referenced regulatory action for the following reasons: failure to make changes to the regulations available to the public; failure to include a response to all public comments; and failure to include all required documents in the rulemaking file.

DISCUSSION

The adoption of regulations by the Air Resources Board (“Board”) must satisfy requirements established by the part of the California Administrative Procedure Act (“APA”) that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by the Office of Administrative Law (“OAL”) for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code Section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

1. THE REGULATIONS CONTAIN CHANGES THAT WERE NOT MADE AVAILABLE TO THE PUBLIC.

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment before the changes are adopted:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. *If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.* Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. (Emphasis added.)

Section 44 of Title 1 of the California Code of Regulations (“CCR”) specifies how such sufficiently related changes are to be made available:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
 - (2) all persons who submitted written comments at the public hearing; and
 - (3) all persons whose comments were received by the agency during the public comment period; and
 - (4) all persons who requested notification from the agency of the availability of such changes.
- (b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

The text of the regulations submitted to OAL for filing with the Secretary of State contained changes from the texts that were made available to the public during the initial forty-five day and subsequent fifteen day comment periods. Such changes are contained in Tables 1, 9, and 12 of the “California Procedures for Evaluating Alternative Specifications for Phase 3 Reformulated Gasoline Using the California Predictive Model” which is incorporated by reference. In Table 12, every mean and standard deviation figure for every fuel property listed in the table was changed. In Table 1, the following language was added to footnote #1: “The Reid vapor pressure (RVP) standards apply only during the warmer weather months identified in section 2262.4.” In Table 9, the relative reactivity values for Diurnal/Resting HC, Hot Soak HC, and Running Loss HC were rounded off from three digits beyond the decimal point to just two digits. Although one might argue that the latter two of these changes may possibly be considered “nonsubstantial”, this is definitely not true as to the changes to Table 12 since changes to the mean and standard deviation figures could affect the evaluation of the candidate Predictive Model alternative specifications for gasoline.

For this reason, the changes to Table 12 of the “California Procedures for Evaluating Alternative Specifications for Phase 3 Reformulated Gasoline Using the California Predictive Model” must be made available for comment pursuant to Government Code section 11346.8(c) and section 44 of Title 1 of the California Code of Regulations. In that the other changes described above also appear to have substance, OAL recommends that all of the changes be made available for public comment at the same time.

2. THE FINAL STATEMENT OF REASONS DOES NOT CONTAIN A SUMMARY AND RESPONSE TO ALL OF THE COMMENTS SUBMITTED DURING THE PUBLIC COMMENT PERIOD.

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a forty-five day comment period prior to adoption of a proposed regulatory action. (Gov. Code, secs. 11346.4 and 11346.5). By requiring the state agency to summarize and respond in the record to comments received during the comment period, the Legislature has clearly indicated its intent that an agency account for all

relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input. Section 11346.9(a)(3) of the Government Code requires that the adopting agency prepare and submit to OAL a final statement of reasons which shall include a “. . . summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reason for making no change.”

The Final Statement of Reasons for this regulatory action does not appear to have a summary and response to comments made at the following locations of comment #1 in tab 12: page 9, VI, second to last paragraph; page 10, VII A; pages 11-12, VIII 3, 4, and 5; page 13, VIII E, F, and the first paragraph of G; and pages 19 -21, XII.

Also, comment #71, which was received during the fifteen day comment period, stated that the references to section “(B)9” should be changed to “(B)10” in new subsection (b)(7)(D)1 of section 2261. The Final Statement of Reasons states that the staff agrees with the comment and will make the requested correction. However, the text of section 2261(b)(7)(D)1 was not revised to accommodate this comment and for this reason this response is currently inadequate. This revision to the text of subsection (b)(7)(D)1 of section 2261 should be made available for public comment for at least fifteen days at the same time the changes to the tables in the “California Procedures for Evaluating Alternative Specifications for Phase 3 Reformulated Gasoline Using the California Predictive Model” are made available as discussed above.

3. THE RULEMAKING FILE DOES NOT INCLUDE A COPY OF ALL OF THE REQUIRED DOCUMENTS.

Subdivision (b)(7) of Government Code section 11347.3 requires that the rulemaking file include:

All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation....

The “Staff Report: Initial Statement of Reasons” for this regulatory action includes in “Chapter VII. References” a twenty-four page reference list. Tab 16 of the rulemaking file, entitled “References”, includes a four page reference list and a compact disc with an extensive collection of documents. This writer was unable to locate and match up all of the documents listed as references in the “Staff Report: Initial Statement of Reasons” with those on the compact disc.

The rulemaking file also failed to contain any copies, as required by subdivision (c) of Government Code section 11343 and section 20 of title 1 of the California Code of Regulations, of the final version of the “California Procedures for Evaluating Alternative Specifications for Phase 3 Reformulated Gasoline Using the California Predictive Model” which is incorporated by reference in this regulatory action.

We also note that (1) the reference to section “(C)5” in new subsection (b)(7)(C) 4.e of section 2261 is inaccurate and that (2) authority and reference citations as required by subdivision (a)(2) of Government Code section 11346.2 are missing from the text of the regulation sections being amended by this rulemaking.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6808.

Date: June 10, 2008

_____/s/_____
CRAIG S. TARPENNING
Senior Staff Counsel

for: SUSAN LAPSLEY
Director

Original: James Goldstene
cc: Trini Balcazar